

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 34

FEDEX HOME DELIVERY, AN OPERATING  
DIVISION OF FEDEX GROUND PACKAGE  
SYSTEMS, INC.<sup>1[1]</sup>

Employer

and

INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, LOCAL UNION NO. 671

Petitioner

Case No. 34-RC-2205

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a Hearing Officer of the National Labor Relations Board. Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding,<sup>2[2]</sup> I find that: the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction; the labor organization involved claims to represent certain employees of the Employer; and a question affecting commerce exists concerning the representation of certain employees of the Employer.

I further find that the Hearing Officer's rulings are free from prejudicial error and are affirmed. In this regard, in its post-hearing brief, the Employer requested a hearing *de novo* claiming that the Hearing Officer: 1) wrongly denied the Employer's attempt to introduce certain tax information in support of its claim that disputed driver Paul Chiappa is a supervisor; 2) made "inappropriate off-the-record statements"

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<sup>1[1]</sup> The Employer's name appears as corrected at the hearing.

<sup>2[2]</sup> I am receiving into evidence as Board Exhibit 2, a letter dated March 2, 2007 from the undersigned to the Employer's counsel, copies of which were previously served upon the parties.

regarding counsel for the Employer's direct examination of a witness; and 3) "verbally confronted a prospective witness with a provocative attack on his credibility." With regard to the first of these claims, I find that the Hearing Officer correctly excluded the tax information at issue as irrelevant. In this regard, I find that the excluded information was of insignificant probative value with respect to the issue of whether Chiappa is a supervisor within the meaning of the Act. With regard to the Employer's second and third claims, these matters were fully and effectively addressed by the Hearing Officer's public apology on the record and by the undersigned's decision to temporarily replace the Hearing Officer in question during the testimony of the offended witness. (See Board Exhibit 2). Furthermore, it is well established that in representation case hearings such as this, the hearing officer makes no credibility determinations (as none are to be made) and no findings or recommendations as to the merits of the issues in dispute. (See Case Handling Manual, Part Two, Representation Proceedings Section 11185). Accordingly, although the Hearing Officer's comments are not acceptable behavior, they have no effect upon the undersigned's independent consideration of the Employer's evidence or positions in this matter. The request for a *de novo* hearing is, therefore, denied.

The Employer, a Connecticut corporation with its principal office located at 758 Rainbow Road, Windsor, Connecticut (referred to herein as the "Hartford Terminal") provides a home package delivery service for routes covered by the Hartford Terminal.<sup>3[3]</sup> The Petitioner seeks to represent approximately 20 drivers, herein referred to as "contract drivers", and who the Employer refers to as "Contractors," employed by the Employer at its Hartford Terminal.<sup>4[4]</sup> The Employer, contrary to the Petitioner, contends that the petitioned-for contract drivers are independent contractors and not employees within the meaning of the Act. In the event that one of

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<sup>3[3]</sup> All locations described herein are within the state of Connecticut, unless otherwise noted.

<sup>4[4]</sup> The Petitioner is not seeking to represent "supplemental" drivers assigned to the Hartford Terminal, who are hired by the disputed contract drivers to operate an additional truck on their route during busy seasons. The Petitioner also does not seek to represent temporary drivers who are employed by the Employer through a temporary agency. Finally, the Petitioner is not seeking to represent Hartford-based contract drivers Roger Jones and Keith Ignasiak, each of whom operates multiple routes; nor is it seeking to represent the three drivers hired and currently employed by Jones or the one driver hired and currently employed by Ignasiak.

the disputed contract drivers, Paul Chiappa, is found to be an employee within the meaning of the Act, the Employer further contends that he should be excluded as a statutory supervisor, and that a disputed driver who operates one of Chiappa's routes, Robert Dizinno, should be excluded as lacking a sufficient community of interest with other contract drivers. There is no history of collective bargaining regarding the petitioned-for unit.

For the reasons set forth below, I find that Employer has failed to satisfy its burden of establishing that the petitioned-for contract drivers at the Hartford Terminal are independent contractors within the meaning of Section 2(3) of the Act. I further find that the Employer as failed to satisfy its burden of establishing that Chiappa is a supervisor within the meaning of Section 2(11) of the Act. Finally, I find that Dizinno shares a sufficient community of interest with other contract drivers to warrant his inclusion in the petitioned-for unit.

#### **I. Prior Related Cases**

Between November 2, 2004 and September 20, 2006, three other regional offices have issued a total of four Decisions and Direction of Elections (DDEs) regarding, *inter alia*, the issue of whether the Employer's contract drivers are employees or independent contractors. The parties herein have agreed to incorporate the transcripts and the DDEs from the following four cases (herein collectively called the DDEs) into the instant record: (1) Case No. 22-RC-12508 involving the Employer's Fairfield, New Jersey terminal (herein referred to as the "Fairfield DDE"), which issued on November 2, 2004; (2) Case No. 4-RC-20974 involving the Employer's Barrington, New Jersey terminal (herein referred to as the "Barrington DDE"), which issued on June 1, 2005; (3) Case No. 1-RC-21966 involving the Employer's Worcester, Massachusetts terminal (herein referred to as the "Worcester DDE"), which issued on January 24, 2006, and (4) Case Nos. 1-RC-22034 and 22035 involving two of the Employer's terminals located in Wilmington, Massachusetts (herein referred to as the "Wilmington DDE"), which issued on September 20, 2006.

In all four DDEs, the Regional Directors rejected the Employer's claim that the drivers at issue, similarly referred to as "Contractors" by the Employer in each case,

were independent contractors, and found instead that they were employees within the meaning of the Act. Following the issuance of each of the DDEs, the Employer filed a Request for Review challenging, *inter alia*, the Regional Director's findings that the contract drivers at issue were statutory employees. In this regard, I take administrative notice of the fact that the Board denied the Employer's Request for Review in all four cases regarding the determination that contract drivers were statutory employees within the meaning of the Act.

## **II. Facts**

As described in the Barrington and Wilmington DDEs, the Employer, established in about 1998 when it acquired Roadway Package Systems, Inc, is engaged in the operation of a nationwide pickup and delivery system for small packages throughout the United States. It has two main divisions, FEDEX Ground, which services business accounts, and FEDEX Home, which is limited to delivering packages to residential addresses. In operating FEDEX Home, the Employer maintains approximately 300 stand-alone terminals nationwide, as well as 200 terminals that share space with Ground Division facilities. As noted above, the Petitioner seeks only to represent those drivers who work at the Employer's Hartford Terminal within its FEDEX Home division.

### **A. The Hartford Terminal**

Primarily responsible for the Employer's operations at the Hartford Terminal is Terminal Manager Scott Hagar. Reporting directly to Hagar are full-time Service Managers Lenny Marchese and Kevin Nketia, and part-time Service Manager Thomas McBride.

The Hartford Terminal, established in about March 2000, operates from Tuesday through Saturday and covers the northern portion of Connecticut. Within this territory, the Employer maintains about 26 "primary service areas (PSA)," also referred to herein as "routes." It currently also has two "open" routes.<sup>5[5]</sup> The Employer considers routes, each of which generally corresponds to a separate zip code, to be proprietary in nature and, as described below, assigns each route to a contract driver. At the time of the hearing, the 26 routes at the Hartford Terminal were assigned to 21 contract drivers. As noted above, two of these contract drivers, Roger Jones and Keith Ignasiak, operate multiple routes, with Jones currently operating four routes and Ignasiak currently operating two routes. As discussed in greater detail below, a third contract driver, Paul Chiappa, has two routes assigned to him, one of which he operates, with the other operated by Robert Dizinno. The

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<sup>5[5]</sup> From 2000 through sometime in 2003, the Hartford Terminal included 30 routes because, in addition to its current territory, it also covered the greater Springfield, Massachusetts area. In 2003, the Employer re-assigned the greater Springfield, Massachusetts area routes to a Massachusetts-based terminal.

remaining 18 routes are assigned to single-route contract drivers. In addition to contract drivers, the Employer employs an unspecified number of temporary and supplemental drivers at the Hartford Terminal, some of who cover the two currently open routes.

At the Hartford Terminal, the process of package delivery begins when the Employer's three trailers arrive from its New Jersey and Connecticut hubs, the first arriving at about 4:00 a.m., the last between 6:00 a.m. and 6:30 a.m. Between about 4:30 a.m. and 7:00 a.m., the Employer's complement of 12 to 15 package handlers at the terminal sort, scan and assemble the approximately 3,000 daily packages onto pallets. During peak periods, generally defined by the Employer's witnesses as the month-long period between Thanksgiving and Christmas, the number of incoming packages on a daily basis swells to 9,000. As described below, contract drivers then load the assembled packages into their respective vehicles.

#### **B. Recruitment of Personnel**

As noted in the Barrington and Wilmington DDEs, the Employer holds nationwide job fairs and places job advertisements in newspapers nationwide seeking individuals who have "dreamed of running" their own business, possess an "entrepreneurial spirit," and are interested in functioning as an "independent contractor." The Employer also conducts informational meetings during which it similarly informs interested candidates that it seeks individuals having an "entrepreneurial spirit" who want to be more than just delivery drivers, and that it seeks an independent contractor relationship with them. The Employer also explains the terms of such a relationship to these candidates.

Interested candidates complete the Employer's job application at the Hartford Terminal. The Employer reviews the applicant's driving and criminal records, as required by the Department of Transportation's Federal Motor Carrier Safety Regulations (herein referred to as "DOT regulations"). The Employer requires those candidates who successfully pass DOT regulations to take a physical examination

and DOT-required drug test.<sup>6[6]</sup> If successful, candidates are then hired by the Employer through a temporary agency, typically Kelly Services, as a temporary driver. Upon hire, temporary drivers undergo a physical examination completed by a qualified and Employer-approved physician. They must also complete a driver-training course required by the Department of Transportation and administered by the Employer at no cost called "Quality Packaging Delivery Learning" (QPDL). The Employer may exempt the temporary drivers from the QPDL training if they have a minimum of one year of commercial driving experience or can provide a certificate of training from another reputable driver training course. The Employer pays the temporary drivers for the time spent in QPDL training, which consists of about five days in the classroom, four days of behind-the-wheel instruction, and five days accompanying managers while they perform deliveries. The classroom portion of QPDL training also includes an orientation covering those procedures that the Employer wants all drivers to adhere to in making deliveries, such as the manner of loading packages into a vehicle, tips on how to use the package scanner (which records the location and delivery of each package during its journey), how to read road plans, and when and where to leave packages if the resident is not home. Following QPDL training, the new hires continue as temporary drivers for varying periods of time. As temporary drivers, they assist contract drivers meet higher demand during the Thanksgiving to Christmas "peak" season, cover for existing contract driver's routes as necessary, or cover open routes.

### **C. The Operating Agreement**

At some undisclosed point during the hiring/training process described above, the Employer presents a "Standard Contractor Operating Agreement" (herein referred to as the "Agreement") to individuals interested in becoming a contract driver. The Agreement is a standardized contract used by the Employer on a nationwide basis that spells out the respective rights and obligations of each party.

The Hartford Terminal manager reviews the Agreement with prospective contract drivers and allows them the opportunity to have the Agreement reviewed by

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<sup>6[6]</sup> The Employer requires all contract drivers to undergo follow-up physical examinations every two to three years, the cost of which is borne by the contract driver. Additionally, as noted in the Wilmington DDE, the Employer requires all contract drivers to submit to quarterly random drug tests.

their lawyer, accountant or any other person of their choosing. With two exceptions, individuals interested in becoming contract drivers do not have the ability to negotiate any of the Agreement's terms. The two exceptions are limited to the particular route to be serviced and an increase to that part of the compensation package relating to the "temporary core zone density settlement," described in greater detail below. Otherwise, the Agreement is presented on a take-it-or-leave-it basis. The Employer typically makes changes to the Agreement once a year, usually in June, at which time contract drivers are given 30 days notice to review the changes and sign the modified Agreement. In this regard, each June since at least 2003, the Employer has unilaterally increased the compensation rates and pay-outs, described below, for Hartford-based contract drivers. As noted in the previous DDE's, contract drivers may choose to enter into a one- or two-year Agreement, which is automatically renewed for successive terms of one year after expiration of the initial term, unless either party provides the other party with 30 days notice of non-renewal.

Under the Agreement, the Employer has the right to terminate the Agreement without notice if the Hartford Terminal closes, there is a decline in business, or the driver breaches the Agreement by engaging in misconduct, reckless or willful negligent operation of equipment, or failure to perform their contractual obligation.<sup>7[7]</sup> In the event of a dispute over a termination decision, the Agreement provides for arbitration by the American Arbitration Association. Contract drivers are required to place \$500 in an interest-bearing escrow account controlled by the Employer to cover any debts owed by the driver to the Employer at the time the Agreement is terminated. The Employer may also retain this amount as liquidated damages if the

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<sup>7[7]</sup> In this regard, in June 2006, Hartford Terminal Manager Scott Hagar involuntarily terminated the Agreement between the Employer and contract driver Winston Stephenson after Hagar determined that Stephenson had failed to attempt to deliver several packages over a two month period. The previous terminal manager, Bruce Rogers, testified that he involuntarily terminated the Employer's Agreement with two Hartford-based contract drivers. In the first case, Rogers terminated the two routes assigned to multi-route contract driver Rudy Cohen after Cohen's delivery vehicle was re-possessioned for failure to make payments despite the fact that Cohen had rented vehicles to continue servicing the routes. In the second instance, Rogers terminated the Agreement with contract driver Ed Ellenberg because the latter "split stops," a practice whereby the driver separately scans each package delivered to the same destination in order to receive a higher per delivery amount from the Employer.



contract driver terminates the Agreement without providing the required 30-day notice.

Each Agreement contains an addendum that specifies the route to be performed by the contract driver. Although the Agreement states the mutual intention of the parties to reduce the geographic size of a contract driver's route if there is an increase in customer and package volume in that area, only the Employer retains the right to unilaterally determine and reconfigure a driver's territory. In this regard, the Agreement permits the Employer, with five working days' written notice, to unilaterally reconfigure any contract driver's route in order "to take account of customer service requirements," such as addressing a growing or shrinking customer base in that area. During the five day notice period, the contract driver has the opportunity to demonstrate that he or she can meet the level of service called for in the Agreement. The Employer may then reconfigure the route if it determines that the contract driver has failed to make such a demonstration.

The Agreement further specifies that "the [contract driver] will provide...services strictly as an independent contractor, and not as an employee of FHD for any purpose." However, the Agreement also requires contract drivers to "[f]oster the professional image and good reputation of FEDEX." This image expressly includes appearance standards established and monitored by the Employer. In this regard, the Agreement provides that the "[Contract driver] acknowledges that the presentation of a consistent image...is essential in order to be competitive...and to permit recognition and prompt access to customers' places of business." The Agreement also provides that contract drivers, or anyone assisting them, must wear approved uniforms and have a personal appearance "consistent with reasonable standards of good order as maintained by competitors and promulgated from time to time by Fedex."

The Agreement prohibits contract drivers from entering into agreements with other package carriers, or from using their delivery vehicle(s) for any other commercial purpose during the time they are delivering packages for the Employer. At all other times, contract drivers may use their vehicles for other commercial or personal purposes, provided that they remove or mask all of the Employer's logos,

described below, or other markings on the vehicle. There is no evidence that any contract driver assigned to the Hartford Terminal has ever used their vehicle for other commercial purposes.

Under the Agreement, contract drivers have the option of incorporating as a business. At the Hartford Terminal, three current contract drivers (Chiappa, Jones, and Garrett Anderson) have incorporated. According to the Wilmington DDE, between 15 and 23 percent of contract drivers nationwide are incorporated.

In addition, the Agreement includes the Employer's "Safe Driving Program," which requires the contract driver to conform to all applicable federal, state and local laws when operating his or her vehicle, breach of which is grounds for termination of the Agreement. The Agreement also specifies 25 separate unsafe driving acts or omissions engaged in by contract drivers for which the Employer may suspend them for 15 days at the sole discretion of the Employer.

The Employer's Contractor Relations Manager, David Durette, testified that the substantive terms of the Agreement have remained fundamentally unchanged since about 2000, and that those substantive terms have been enforced as written at the Hartford Terminal at all material times.

**D. Route Acquisition and Route Sales**

**1. Route Acquisition**

Individuals interested in becoming contract drivers obtain routes either from the Employer or from an existing contract driver. With regard to the first of these means, the Employer does not sell or purchase routes. Rather, if the Employer has a vacant or "open" route, it provides the route at no cost to individuals who have expressed an interest in becoming a contract driver or to existing contract drivers who seek a different or additional route. Vacant routes become available if the contract driver previously assigned to that route was terminated, resigned or if the Employer created a new route.

With regard to the second of these means, contract drivers have the right to convey their current route to existing contract drivers or other interested individuals. In each of these cases, the details differ regarding the nature of the conveyance and/or whether any consideration was exchanged for the route. For example, in some of these cases, the former contract driver merely relinquished his or her route at no cost to the new contract driver, or sold their current delivery vehicle to the new contract driver, but did not "sell" or receive further consideration for conveying the route. In the latter circumstance, the acquiring contract driver either paid cash for the balance of the vehicle's value or merely took over the payments remaining on the vehicle lease or loan agreements.

If a contract driver no longer wishes to service their route, but cannot find anyone to acquire their route either at no cost or for consideration, the contract driver must relinquish the route to the Employer at no cost.

**2. Route Sales**

In addition to the foregoing, under the Agreement, contract drivers may sell their routes to buyers deemed to be qualified by the Employer and willing to enter into the Agreement with the Employer "on substantially the same terms and conditions" as the original contract driver. Contract drivers do not need to notify the Employer or receive its permission about a pending route sale. However, once the sale is complete, contract drivers must notify the Employer about the transaction so that the buyer may sign the Agreement. Although the Employer does not become involved in

any negotiations between these parties, or approve the terms of the negotiation, the Employer nevertheless retains the right to approve the individual acquiring the route. Additionally, according to the Wilmington DDE, the Employer may "as an accommodation...collect the consideration from the replacement contractor by deducting it from his or her weekly settlement and remitting it to the seller."<sup>8[8]</sup>

The record discloses that the overwhelming majority of the contract drivers currently assigned to the Hartford Terminal acquired their routes from the Employer or from a previous contract driver at no cost for the route itself. In this regard, since it opened in 2000, there is evidence of no more than two route sales occurring at the Hartford Terminal.

#### **E. Duties and Responsibilities of Contract Drivers**

As previously noted, the Employer operates its delivery business from Tuesday to Saturday. The Agreement requires contract drivers to deliver, on each of those days, all packages assigned to their route on the same day they arrive at the Hartford Terminal. In making such deliveries, contract drivers must meet the industry's and Employer's nationwide standard of providing service in a way "that can be identified as being part of the [Employer's] system." In practical terms, this means that contract drivers are discouraged from delivering packages after 8 p.m.; must leave packages for recipients not at home according to the Employer's "Package Release Program" protocols; and must wear the Employer's uniforms and badges, maintained in good condition, at all times. As noted above, they must also maintain their personal appearance consistent with the Employer's articulated standards.

As previously noted, between about 4:30 a.m. and 7:00 a.m., the Employer's package handlers at the Hartford Terminal assemble newly-arrived packages onto pallets. Consequently, a majority of Hartford-based contract drivers arrive at the Hartford Terminal between 6:00 a.m. and 7:00 a.m. and begin loading the assembled packages into their respective vehicles. As part of the Employer's "Business Support Package," described in greater detail below, contract drivers obtain scanners into which they, *inter alia*, report their on-duty time immediately before loading their

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<sup>8[8]</sup> In the event an incorporated contract driver sells or transfers the rights to that corporation to a new person, a new Agreement does not need to be executed because the corporation remains the entity signatory to and responsible for the original Agreement.

packages and scan each loaded package. Once they have finished loading their vehicle, contract drivers report that they have done so to the Employer's terminal management, who in turn "close" the route by resetting the driver's scanner. Management also provides each contract driver with a route manifest and "turn-by-turn" instructions (also called a "Vehicle Routing Program" or "VRP") that lists the driver's stops and suggested delivery sequence for the day. Contract drivers are under no obligation to follow the VRP's delivery order. In this regard, they can and do deliver packages in any order and by any route of their choosing. Contract drivers cannot leave the terminal until their scanners are reset by management and a route manifest is generated. Depending on volume, most contract drivers leave the Hartford Terminal between about 8:30 a.m. and 9:00 a.m. to begin their delivery functions. In this regard, Hartford Terminal Manager Hagar testified that, with the exception of two contract drivers who arrive at the terminal as late as 10:00 a.m. and leave after 11:00 a.m., the remaining contract drivers all leave the terminal no later than 9:00 a.m. Upon completing a specific delivery, each contract driver is required by the Employer to use their scanner to input information relating to the delivered package, including the identification of individuals who signed for the package or the location of released packages. This scanned information tracks the movement of packages and is immediately transmitted to the Employer. Contract drivers also enter their off-duty time into the scanners. Based on information captured by the scanner, the Employer generates an "hours report" that describes each contract driver's start and end time. This report is reviewed daily by the Employer's managers at the Hartford Terminal to determine the number of hours each contract driver spends on the road. Contract drivers must also submit a "Daily Delivery Report" to terminal management that shows whether they failed to deliver any of the packages assigned to their route on the previous day. Hartford Terminal Manager Hagar testified that he reviews these reports on a daily basis to determine whether any of the Hartford-based contract drivers are failing to provide proper service and, if so, whether it warrants the termination of a contract driver's Agreement.

As part of the Agreement, the Employer maintains a "Driver Release Program," which specifies the manner in which deliveries must be made when the

package recipient is not home. As noted in the Wilmington DDE, contract drivers must leave such packages only at residential dwellings with single family entrances, out of public sight, and in places inaccessible to animals and not susceptible to weather damage (or at least wrapped in a weatherproof bag). Contract drivers are liable for the loss of any delivered package if they: (1) fail to adhere to any of the above protocols; (2) fail to obtain a required signature; (3) release packages to a business, apartment, or house with public access or common entryways; or (4) release a package to the wrong address.

Under the Agreement, the Employer maintains the right to conduct "driver release audits," in which a manager rides along with the contract driver up to four times annually to verify that they are meeting customer service standards provided in the Agreement and complying with the Driver Release Program. In addition, the Employer retains the contractual right to conduct two "customer service rides" annually with each contractor, during which a manager rides alongside for the day. According to Hartford Terminal Manager Hagar, during these rides the manager evaluates the contract driver's customer contacts and driving methods, and may suggest various operational improvements the contract driver can make related to package loading, delivery sequencing, scanning practices, and other responsibilities. According to the Fairfield DDE, such rides are required following a customer complaint about a contract driver. According to the same DDE, the manager also determines whether the contract driver has an appropriate workload and rates the contract driver's performance in areas such as professional appearance and customer courtesy. The Employer may memorialize the results of these rides and rely on them to decide whether to terminate a contract driver's Agreement.

Apart from the above restrictions, contract drivers generally have the discretion to operate their routes and perform deliveries in the sequence and manner they see fit.

In this regard, the Agreement provides that the Employer does not have the authority to direct contract drivers regarding the manner or means they employ to perform their delivery duties, their hours of work, whether or when they take breaks, the order in which to make deliveries, or other details of their performance. Contract drivers are

also free to use their vehicles to perform personal duties during the course of the work day. Contract drivers do not return to the Hartford Terminal after completing their deliveries and most, if not all, park their vehicles at their homes at the end of the work day. Additionally, contract drivers need not personally perform the contracted delivery service. Rather, they can hire another DOT-qualified and Employer-approved driver, typically one of the Employer's temporary drivers or another contract driver, to perform their deliveries. If the volume of deliveries on a contract driver's route is beyond the capacity of a single vehicle, the contract driver may choose to lease a second vehicle, referred to as a supplemental vehicle, and hire an additional DOT-qualified and Employer-approved driver, known as a supplemental driver, to fulfill the route's demand. At least half of the Hartford-based contract drivers use supplemental vehicles and drivers, usually during the peak Christmas season. Contract drivers also have the right to hire "helpers" at employment terms negotiated exclusively between the contract driver and helper, who ride alongside the contract driver and assist in delivering packages. The record shows only one example of a Hartford-based contract driver, Melvis McMillan, ever having employed a helper, which occurred for an unspecified period of time.<sup>9[9]</sup>

Under the Agreement, the Employer retains the contractual right to adjust the volume of a contract driver's daily deliveries. In this regard, the Agreement states that on any day where the volume of packages on a contract driver's route exceeds the volume that they can reasonably be expected to timely deliver, the Employer may re-assign a portion of such packages to another contract driver. In such circumstances, the terminal manager will first provide the contract driver with the opportunity to describe how he or she will be able to timely complete their deliveries that day. In addition, the Employer maintains a practice known as "flexing," under which the Hartford Terminal manager daily adjusts the number of packages delivered by each contract driver by directing them to deliver packages to locations outside their route. Such "flexing" may occur when the terminal manager: (1) seeks to ensure that no contract driver exceeds the maximum number of hours of driving time

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<sup>9[9]</sup> There is no contention that the contract drivers are supervisors under Section 2(11) of the Act because of their right to utilize supplemental drivers or helpers during the peak season.

permitted by DOT; (2) seeks to provide service to a route when the contract driver regularly assigned to that route becomes unavailable due to illness or other reasons; or (3) as described above, determines that the volume of packages to be delivered on one route exceeds the contract driver's ability to timely deliver them. Contract drivers may not reject the "flexed" deliveries assigned to them. Contract drivers may also "flex" packages amongst each other, principally with contract drivers who service an adjacent route. They do not need the Employer's permission to engage in such "flexing."

Contract drivers play no role in generating customers or establishing the prices to be charged for deliveries. Rather, customers contact the Employer to arrange for deliveries and the Employer exclusively sets all delivery prices, which it quotes and charges to those customers. Customer complaints about a contract driver's delivery service are directed to the Employer and investigated by the managers at the Hartford Terminal. If the manager determines that the complaint is valid, the contract driver receives a lesser amount of compensation in the following settlement check, as described below.

#### **F. Vehicle Acquisition**

In order to service their routes, all contract drivers must initially purchase or lease a vehicle approved by the Employer. Although the Agreement does not specify the make or size of a contract driver's vehicle, it does provide that the vehicle is "subject to the determination of its suitability for the service called for." In practice, this provision means that the contract driver must have a vehicle that is sufficiently large to service his or her particular route.

Generally, contract drivers at the Hartford Terminal purchase their vehicle from a local or national truck dealer, or from a current contract driver looking to relinquish their route. With regard to truck dealers, the Employer typically provides contract drivers with the names of local and national dealers from which to purchase the vehicle. However, contract drivers are not obligated to purchase/lease their vehicle from these dealers. With regard to purchasing a used vehicle from a current driver, a contract driver who becomes newly assigned to a route frequently purchases the vehicle of the contract driver formerly assigned to that route. The parties negotiate



the terms of the vehicle sale without Employer involvement. In addition, the Employer maintains a web site that lists the name and contact information on all of its current contract drivers nationwide who are seeking to sell their delivery vehicle. Contract drivers access this website through their Employer identification number and, thereafter, without further Employer involvement, contact other contract drivers listed therein to negotiate the terms of any vehicle sale.

With regard to vehicle financing, the Employer does not provide financing or guarantee loans obtained by contract drivers. However, the Employer typically provides contract drivers with the names of five or six lenders willing to finance the purchase or lease, including Bush Leasing, an enterprise with which the Employer maintains an unspecified business affiliation.<sup>10[10]</sup> However, contract drivers are not obligated to patronize these lenders. Rather, they are free to obtain vehicle financing through any source of their choosing.

In order to comply with DOT regulations, the Employer requires that contract drivers submit daily driver logs and vehicle inspection reports to the Employer, and that their vehicles pass an annual safety inspection. In order to comply with the same DOT regulations, but also to foster nationwide brand recognition, the Employer requires that all delivery vehicles carry the Employer's logo, which is larger than the DOT minimum. In this regard, contract drivers can opt to either have the Employer paint its logo onto the vehicle, or purchase a removable magnetic logo. The Employer directs contract drivers to a particular business for applying its logo to the vehicles.<sup>11[11]</sup> Additionally, the Employer requires that vehicles be white, have a backing camera, and that the vehicle be maintained in a clean condition, free of damage and extraneous markings. Sometime in 2006, the Employer responded to growing customer complaints regarding the delivery of damaged goods by requiring contract drivers who operated vehicles of a certain size to purchase and install a vehicle shelving system, estimated at \$1,300, at the contract driver's expense. The

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<sup>10[10]</sup> Contract driver Garrett Anderson generally testified without elaboration that the lease for his vehicle through Bush Leasing was "like a purchase through Fedex..."

<sup>11[11]</sup> The record does not reflect the percentage of Hartford Terminal contract drivers who have the Employer's logo painted on their vehicle versus utilizing the magnetic logos.

vehicle shelving system insures that packages do not crush each other during the course of the day.

Contract drivers bear all expenses in operating their vehicle, including the costs of repairs, maintenance, fuel, oil, taxes, tires, insurance, license fees, depreciation and tolls.<sup>12[12]</sup> However, in order to track a vehicle's fitness, the Employer requires contract drivers to submit a monthly maintenance form on which the vehicle's tire tread depth is noted, with receipts for maintenance and completed repair work attached. Further, as described in the Wilmington DDE:

in order to encourage [contract drivers] to accumulate a fund from which they may pay expenses such as vehicle maintenance and substitute operators, the Operating Agreement provides that Fedex Home will maintain and pay interest on a Service Guarantee Account into which the contractors deposit money. Pursuant to Addendum 3 of the Agreement, for each quarter in which a [contract driver's] average balance in the account is \$500 or more, Fedex contributes \$100. Addendum 3 also provides that Fedex Home, in its discretion, make loans to [contract drivers] to fund maintenance costs in excess of the balance of their Service Guarantee Account, up to a maximum of \$5,000, depending on the balance in their account.

If a vehicle becomes inoperable for any length of time, contract drivers are required to provide a suitable alternative at their expense. Generally, this requires contract drivers to rent a replacement vehicle at their expense from a national car rental firm, such as Enterprise.

**G. Compensation, other Employer support and insurance**

**1. Compensation**

Under the Agreement, the Employer unilaterally determines the rates of compensation and pays contract drivers with a weekly "settlement check" that is based, *inter alia*, on the number of packages delivered, the number of stops made, the distance traveled, and the number of days his or her vehicle is available to provide service.

The Employer also pays various bonuses to its contract drivers, including a \$750 quarterly payment to those contract drivers who service two or more routes; an

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<sup>12[12]</sup> Under the Agreement, contract drivers may authorize the Employer to pay licenses, taxes and fees on their behalf and to deduct the amount of those payments from their compensation.

unspecified amount for making deliveries during "peak" season; a quarterly "service bonus," based on the number of years that the individual contract driver has worked in that capacity for the Employer; and a \$120 bonus for each accounting period that the contract driver has met certain goals regarding scanning accuracy and has an absence of at-fault accidents or verified customer complaints. Further, as described in the Wilmington DDE:

[A]ll [contract drivers] are eligible for a group performance-related bonus ranging from \$10 to \$30 per [contract driver] per period, if the terminal in which they work meets a group "inbound service" goal for the period...(and) receive a bonus of \$50 per month if they do not fail a driver release audit and receive no driver release complaints.

Additionally, the Employer includes in the settlement check a "Temporary Core Zone Density" (TCZD) payment, ranging from \$27 to \$127 daily, to those contract drivers servicing routes where the customer density and package volume is still developing. Under the Agreement, the Employer retains the right to unilaterally eliminate the TCZD. Conversely, as noted above, it appears that contract drivers also have the contractual right to request negotiations with the Hartford Terminal manager regarding an increase to the TCZD portion of the settlement check. If so requested, the Employer conducts a "customer service ride" with the contract driver to evaluate the appropriateness of an increase. There is no evidence that any of the Hartford-based contract drivers have successfully negotiated an increase to their respective TCZD allotment.

If fuel prices increase substantially, the Agreement provides that the Employer will pay contract drivers a fuel/mileage settlement of up to 10 cents per mile depending on fuel prices within a five-mile radius of the Hartford Terminal.

## **2. Other Employer Support**

In describing the level of support that contract drivers receive from the Employer, current Hartford contract driver Ernest Johnston generally testified that "Fedex is there for you all day, for any reason that you might need them." In this regard, the Employer provides support to its contract drivers in a variety of means. As previously noted, the Employer refers contract drivers to dealers from which they may lease or purchase their vehicle, to lenders willing to finance such purchases, and

to its website that lists other contract drivers wishing to sell their vehicle. Also, as previously noted, the Employer provides each contract driver with daily route manifests and suggested delivery sequences, and suggestions during the “customer service rides” for improving their delivery performance. Also, as previously noted, the Employer shields contract drivers from losses due to substantial increases in fuel by means of the fuel/mileage settlement, and pays qualifying contract drivers \$100 per accounting period in order to defray repair costs, and also pays certain vehicle-related taxes and fees on their behalf.

In addition to the foregoing, contract drivers have the option to purchase the Employer's "Business Support Package" (BSP), which, if purchased, is deducted from the settlement check. At a daily cost of \$4.25 per vehicle in service, the BSP provides contract drivers with the following items required by the Employer in order to make deliveries: uniform and identification badges bearing the Employer's name; vehicle decals bearing the Employer's logo; scanner and related communications equipment;<sup>13[13]</sup> annual DOT-required vehicle inspections and random DOT-required drug tests; mapping software; contract driver assistance programs;<sup>14[14]</sup> and a weekly vehicle washing service necessary to comply with both government regulations pertaining to waste water run-off and with contractual standards. While contract drivers are free to purchase these required goods and services elsewhere, there is no evidence that any Hartford-based contract driver has ever done so.

The record reveals that the Employer periodically assists contract drivers with other vehicle-related issues. In this regard, contract driver Chiappa testified that the Employer's managers intervened on his behalf on two separate occasions regarding repair and warranty disputes involving his vehicle. According to Chiappa, on both occasions, the Employer's intervention led to a reduction in the repair costs. On another occasion, in 2005, former Hartford Terminal manager Bruce Rogers made all the arrangements and placed the order for a delivery vehicle purchase on behalf of

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<sup>13[13]</sup> As noted above, the Employer uses the scanner to record the location and delivery of each package and to meet DOT requirements that carriers know where their shipments are located, and log the number of hours driven by each contract driver.

<sup>14[14]</sup> None of the DDEs, their underlying records, nor the instant record reveal what these programs entail.

Hartford-based contract driver Ilir Dishnica, following the latter's decision to become a contract driver. As necessary, the Employer lends money to contract drivers so they can repair their vehicles, and charges interest on such loans that are tied to the current "T-bill rate." As described in greater detail below, the Employer also assists contract drivers to secure vehicle insurance.

Except as noted herein, the Employer does not provide contract drivers with any fringe benefits, including vacations or paid holidays, nor does it withhold taxes from their settlement checks. Rather, the Employer annually provides a 1099 form to each contract driver. With regard to vacations, because contract drivers are responsible for finding a qualified substitute driver to cover their route when on vacation, the Employer provides contract drivers the opportunity to buy into its "Time-Off Program." Under this program, the Employer provides contract drivers with approved drivers to service routes while the contract driver is on vacation. Most of the Hartford-based contract drivers participate in the Time-Off Program.

Additionally, Hartford Terminal Manager Hagar holds weekly "round table" discussions with contract drivers during which Hagar provides them with suggestions on how to improve their delivery techniques and performance. The Employer's Regional Safety and Maintenance Director, Michael Carey, also periodically meets with Hartford-based contract drivers to discuss safety issues.

### **3. Insurance**

The Agreement requires contract drivers to carry the following three forms of insurance in types and amounts specified by the Employer: (1) general liability insurance; (2) "dead head" or "bobtail" insurance; and (3) work accident insurance. According to the Agreement, a contract driver's failure to maintain any of these three forms of insurance amounts to a contractual breach that could lead the Employer to terminate the Agreement. Regarding the first of these types, the DOT requires carriers, such as the Employer, to maintain public liability insurance to protect against cargo loss, and to protect the public against injuries or damage caused by the carrier's vehicles or those of its contractors. According to Manager of Contractor Relations Timothy Edmonds, in order to meet these regulations, the Employer maintains a self-insured general liability program that indemnifies itself and its

contract drivers against claims of vehicular personal injuries, property damage, cargo loss, or damage resulting from the contract driver's operation of equipment in connection with the Employer's business. Although the Employer does not charge contract drivers for the cost of maintaining this insurance, all contract drivers are liable for the first \$500 in damages resulting from the operation of their vehicles. That amount is reduced to \$250 after one year and eliminated after two years of operation if they have no "at-fault" accidents during that timeframe.

Under the Agreement, contract driver indemnification does not occur if they or their designated vehicle operator engages in willfully negligent or intentional misconduct, or if they fail to comply with the Employer's Safe Driving Program standards. Following either of these two circumstances, the Employer can revoke the contract driver's participation in its self-insurance plan and require the contract driver to secure their own liability insurance for damages occurring while in the performance of the Employer's business.

The second type of insurance required by the Agreement, "dead head" or "bobtail" insurance, insures contract drivers against damages they incur while operating their vehicles for personal use. In this regard, the Employer requires contract drivers to carry collision and liability insurance at their own expense in certain specified amounts (higher than the State minimum) to protect against damages occurring when there are no packages aboard the vehicle or when the contract driver or his operator is not engaged in providing service for the Employer.

The third type of insurance required by the Agreement, work accident insurance, is akin to worker's compensation coverage. Under the Agreement, contract drivers must maintain such insurance at their own expense in specified amounts for both themselves and drivers or helpers they may utilize.

The Employer maintains an undefined relationship with an insurance company, Protective Insurance, which provides contract drivers with any required insurance, including the "dead head" or work accident insurance. Although contract drivers are not required to obtain such insurance through this company, the record shows that they frequently do so because Protective's rates are significantly lower than rates they can obtain elsewhere on their own. If the contract driver chooses to insure

through Protective, the Employer deducts the cost of premiums from their settlement checks.

#### **H. Multi-Route Operators**

As noted above, contract drivers have the right under the Agreement to obtain and operate multiple routes. Interested drivers obtain such additional routes in the same manner as described above in Section II.D. Regardless of how the additional route is acquired, the contract driver must sign a separate addendum covering the additional route. In order to provide service for the additional route, a contract driver acquires an additional vehicle through the same means previously described, and either hires their own drivers to regularly service the route or temporarily contracts with one of the Employer's temporary drivers. Drivers hired by contract drivers must be DOT-qualified and must be approved by the Employer. In this regard, all drivers must have clean driving and criminal records, and must pass the same physical examination, drug tests and Employer's Safe Driving Program described above that are applicable to all contract drivers. Drivers hired by contract drivers must follow all applicable work rules previously described, including the use of the scanner and the wearing of the Employer's uniform and badges while performing deliveries.

Contract drivers have sole authority to hire and dismiss their drivers, and to manage, supervise and determine the terms and conditions of their relationship with the driver, including work hours, bonuses, and approval of time off requests. Contract drivers are responsible for paying their driver's wages or compensation and for all expenses associated with hiring or engaging drivers, such as the cost of training, physical exams, drug screening, employment taxes, and work accident insurance. The amount of the driver's compensation and/or benefits and other matters, such as who is responsible for fuel costs, are exclusively matters of negotiation between the contract drivers and the individuals he or she hires. Every day, while packages are being loaded in the terminal, multiple-route contract drivers can shift packages among their hired drivers as they see fit. In the event the Employer learns of delivery problems with one of the drivers hired by the contract drivers, the Employer has the contractual right to speak to the contract driver about that individual.

Since the Hartford Terminal opened in 2000, a total of six contract drivers have at one time or another operated multiple routes. At the time of the hearing, only three of these drivers were currently doing so. As noted above, with the exception of multi-route contract driver Paul Chiappa, the Petitioner does not seek to include in the petitioned-for unit the other two current multi-route operators, Roger Jones and Keith Ignasiak. I will deal with Chiappa's eligibility in a separate section below.

**I. Supervisory status of Paul Chiappa and unit status of Robert Dizinno**

In about April 2003, Chiappa entered into an Agreement with the Employer as a contract driver and was assigned to service a route that encompassed 14 towns in the Litchfield County area. Chiappa, who lived in this area, acquired this route directly from the Employer at no cost. In about September 2003, Chiappa's wife, who was employed by another employer, lost her job. In order to retain health insurance and other benefits, the couple decided that Chiappa would return to his former position as a supervisor with another area employer, and that his wife would perform the deliveries for the Litchfield route. Chiappa's wife performed the Litchfield route delivery duties without any oversight from her husband until November 2005, at which time Chiappa resumed personally servicing the Litchfield route.

In about the summer of 2004, Chiappa's long-time friend, Robert Dizinno, expressed his interest to Chiappa about becoming a contract driver for the Employer. Chiappa testified that he told Dizinno to speak directly with then-Hartford Terminal Manager Rogers about acquiring an open route. Dizinno followed Chiappa's advice and contacted Manager Rogers about becoming a contract driver. He thereafter enrolled in the Employer's QPDL training and served as a temporary driver. According to the uncontroverted testimony of Chiappa and Dizinno, Manager Rogers was primarily interested in having Dizinno sign an Agreement and become a contract driver. However, according to both witnesses, when the time came for Dizinno to acquire a delivery vehicle, he was unable to do so due to his poor credit rating. Upon learning of this development, Manager Rogers informed Chiappa and Dizinno that the Hartford Terminal had several available routes that Dizinno could service as a contract driver, but for the fact that the Employer could not offer him a contract



driver's Agreement in view of his inability to acquire a vehicle. According to Chiappa, Manager Rogers suggested to Chiappa that Dizinno could still drive for the Employer if the route to which he would be assigned was nominally operated under the auspices of a corporate entity headed by Chiappa, along with Dizinno's purchase of Chiappa's then-aging delivery vehicle. Chiappa informed Rogers that he would like to sell said vehicle, but that he did not want to operate a second route, that he did not want to supervise another driver, and that any supervisory issues that arose would be strictly between Rogers and Dizinno. It is undisputed that Rogers agreed to Chiappa's terms and further agreed that Dizinno would earn all of the money associated with his assigned route.

In August 2004, as a result of the aforementioned discussions, Chiappa and Dizinno incorporated an enterprise known as "Scoville Hill Associates, LLC," under which Chiappa, Dizinno and Chiappa's wife became the corporation's managing members. In October 2004, Chiappa purchased a new vehicle to service the Litchfield route and sold his former delivery vehicle to Dizinno. In about November 2004, Chiappa signed an addendum to his Agreement covering the open Manchester route, which Rogers assigned to Dizinno. Since that time, Dizinno has continued to service the Manchester route and the Employer has continued to send separate settlement checks and statements for each route in the corporation's name. Each week, after depositing the settlement check relating to the Manchester route into the corporation's account, Chiappa sends Dizinno the full amount of the Manchester route's settlement check. Chiappa and Dizinno also evenly split all bonuses, including the \$750 quarterly bonus paid to multi-route contractors. Because the Employer submits only one 1099 form covering both routes in the corporation's name, the corporation separately provides Dizinno with a 1099 form for the gross annual settlement check amounts received from the Employer for the Manchester route.

Both Chiappa and Dizinno testified without contradiction that Chiappa has never "supervised" Dizinno in any manner in servicing the Manchester route; that since November 2004, Chiappa has spent a total of one hour on the Manchester route when Dizinno injured his shoulder; and that Dizinno pays for all expenses associated with operating the Manchester route and receives the full settlement

amount for operating that route. There is no evidence that Chiappa currently or has ever engaged in any of the indicia enumerated in Section 2(11) of the Act with regard to Dizinno's operation of the Manchester route.

Sometime in 2005, Dizinno formed Mohawk Transportation, LLC. Since that time, Dizinno has filed a "Schedule C" form with his federal income taxes listing all business expenses incurred in operating the Manchester route, including gas and vehicle maintenance expenses. As described by Dizinno, "[O]ther than being very good friends, we're business partners. He does his thing and I do my thing. He (Chiappa) incurs expenses on his route, I incur expenses on my route. They're totally separate."

Beyond the dynamics of the business relationship between Chiappa and Dizinno, it appears that the Employer treats Dizinno as a contract driver in his own right. In this regard, unlike its treatment of other drivers hired by and working for contract drivers, the Employer conducts all discussions regarding the Manchester route directly with Dizinno, not with Chiappa. Such discussions include customer service issues and the amounts that are due to temporary and supplemental drivers used by Dizinno for the Manchester route during the peak season. In addition, at its Hartford Terminal, the Employer maintains mailboxes for all its contract drivers, but not for other drivers, so that contract drivers can receive direct Employer communications regarding a number of route-related matters. From November 2004 through February 2007, the Employer maintained separate mailboxes for Chiappa and Dizinno. On February 27, 2007, the second day of the hearing in the instant matter, Dizinno's name was removed from his mailbox without explanation.

### **III. Analysis and Conclusions**

#### **A. Independent Contractor Status of Contract Drivers**

##### **1. Applicable Law**

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of independent contractor." The burden is on the party asserting independent contractor status to establish such status. [BKN Inc., 333 NLRB 143, 144 \(2001\)](#). In determining whether an individual is an employee or an independent contractor, the Board applies the common law agency test set forth in

Restatement (Second) of Agency, Sec. 220,<sup>15[15]</sup> and considers all the incidents of the individual's relationship with the employing entity. *Argix Direct, Inc.*, 343 NLRB 1017 (2004), and cases cited therein.

On three separate occasions prior to the Employer's acquisition of Roadway Package Systems in 1998, the Board considered whether contract drivers employed by Roadway were independent contractors or employees within the meaning of the Act. In each case, the Board found that the drivers were employees. See *Roadway Package Systems (Roadway I)*, 288 NLRB 196 (1988); *Roadway Package Systems (Roadway II)*, 292 NLRB 376 (1989), enfd. 902 F.2d 34 (6<sup>th</sup> Cir. 1990); and *Roadway Package Systems (Roadway III)*, 326 NLRB 842 (1998). In addition, as noted above, on four occasions since the Employer's acquisition of Roadway, the Board has affirmed Regional Director determinations that contract drivers employed by the Employer at either its Home or Ground operations are not independent contractors and are statutory employees.

In *Roadway III*, the Board focused on the following factors and considerations in concluding that contract drivers are employees and not independent contractors: they did not operate independent businesses, but instead performed functions that were an essential part of the company's normal operations; they did not have any prior training or experience, but instead received training from the company; they did business in the company's name with assistance and guidance from it; they did not ordinarily engage in outside business; they constituted an integral part of the company's business under its substantial control; they had no substantial proprietary interest beyond their investment in their vehicles; and they had no significant entrepreneurial opportunity for gain or loss. *Id.* at 851. In more recent cases involving the same issue, the Board has similarly relied upon the same or similar

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<sup>15[15]</sup> The factors set forth in that test include: 1) the control that the employing entity exercises over the details of the work; 2) whether the individual is engaged in a distinct occupation or work; 3) the kind of occupation, including whether, in the locality in question, the work is usually done under the employer's direction or by a specialist without supervision; 4) the skill required in the particular occupation; 5) whether the employer or the individual supplies the instrumentalities, tools, and the place of work for the person doing the work; 6) the length of time the individual is employed; 7) the method of payment, whether by the time or the job; 8) whether the work in question is part of the employer's regular business; 9) whether the parties believe they are creating an employment relationship; and 10) whether the principal is in the business.

factors in finding purported independent contractors to be statutory employees. See *Corporate Express Delivery Systems*, 332 NLRB 1522, 1522 (2000), enf'd. 292 F. 3d 777 (D.C. Cir. 2002).

## **2. Conclusion**

Based upon the foregoing and the record as a whole, I find that the Employer has failed to satisfy its burden of establishing that its contract drivers are independent contractors within the meaning of Section 2(3) of the Act. More particularly, I rely upon the following factors.

### **a. The Employer exercises substantial control over the details of contract driver performance.**

As in *Roadway III*, the Employer in the instant case exercises substantial control over the contract driver's daily performance. In this regard, the Employer offers contract drivers what is essentially a take-it-or-leave-it agreement. It also retains the right to unilaterally reconfigure a contract driver's assigned route. The Employer also requires that contract drivers: (1) provide delivery service every day from Tuesday through Saturday; (2) deliver all packages assigned to their route on the same day they are received in the Hartford terminal; (3) deliver all packages for destinations outside their route that are "flexed" to them by the Hartford Terminal manager; (4) scan all packages with the Employer's scanner at the time packages are loaded into their vehicle and delivered; (5) leave the Hartford Terminal only after the Employer has closed their route; (6) exclusively use certain approved vehicles for package deliveries while wearing approved uniforms and badges identifying them as employees of the Employer; (7) maintain their vehicles in a clean and presentable fashion, free of body damage and extraneous markings and prominently displaying the Employer's name, logo and colors; (8) purchase insurance in types and amounts specified by the Employer; (9) allow the Employer's managers to ride along with them several times annually in order to conduct a "Customer Service Ride" or a "Driver Release Audit;" and (10) follow the Employer's detailed delivery policies and practices, including the "Driver Release Program" relating to how packages are delivered to empty residences, and its "Safe Driving Program." With regard to these two latter programs, the Employer exercises control over contract drivers by issuing

monthly bonuses to those drivers who comply with these programs. Although the logos, uniforms and badges are to some extent designed to comply with DOT regulations, they are larger than required by DOT regulations, and they are also an important component of the Employer's nationwide effort to market its brand name.

**b. Contract Drivers perform a function that is a regular and essential part of the Employer's principal business.**

There is no evidence demonstrating that the Employer's contract drivers are engaged in a distinct occupation or work. Rather, contract drivers perform a function that is a regular and essential part of the Employer's principal business operations. Reflective of this reality, the Employer employs a complement of temporary drivers to deliver packages to routes not yet permanently assigned to a contract driver. Further, under the Agreement, when the Employer ultimately assigns a route to a contract driver, they must deliver packages in the same manner as the Employer's temporary drivers, and must do so in a manner "that can be identified as being part of the FHD system." As such, contract drivers must conduct business in the name of the Employer by wearing Employer uniforms and badges, and operating vehicles that prominently display the Employer's name, logo and colors. Significantly, they are prohibited from entering into agreements with other package carriers or from engaging in other commercial pursuits while they are performing delivery services for the Employer. Although they have a contractual right to use their vehicles for other business purposes when they are not providing service for the Employer, they must first remove or mask the Employer's name, logo and colors, a task that constrains their ability to freely utilize their vehicle for other commercial enterprises. Their ability to use their vehicles for other business purposes when they are not providing service for the Employer is further constrained by the Employer's requirement that the contract drivers provide delivery services every Tuesday through Saturday between the hours of approximately 6 am to 8 pm. Consequently, since the Hartford Terminal opened in 2000, there is no evidence that any Hartford-based contract driver has ever used their vehicle for other commercial or independent business purposes. I find, as did the Board in *Roadway III*, that "[t]his lack of pursuit of outside business activity

appears to be less a reflection of entrepreneurial choice by the...drivers and more a matter of the obstacles created by their relationship with [the Employer].”

Accordingly, as the Board found in *Roadway III*, because the Employer’s delivery requirements effectively prevents the contract drivers from realistically pursuing other commercial activities with their vehicles, their right to engage in such outside activity amounts to “entrepreneurial opportunities that they cannot realistically take.”

*Roadway III*, supra, at 851 and fn. 36.

Moreover, the Employer exclusively solicits customers and is solely responsible for arranging the deliveries made by contract drivers. In addition, the Employer’s customers complain directly to the Employer, and not to the contract drivers, regarding all delivery issues. Following such complaints, the Employer unilaterally determines whether the contract driver is at fault and takes whatever remedial action it deems appropriate, including the termination of a contract driver’s Agreement. Such control of customer solicitation and service shows that the Employer is principally engaged in, and responsible for, its package delivery business, and for protecting its reputation within that industry.

**c.     Contract drivers do not need any significant skill or experience to perform the Employer’s delivery functions.**

The evidence demonstrates that contract drivers do not need any significant prior training or experience to perform the Employer’s delivery functions. Rather, the Employer operates its QPDL training course to instruct prospective contract drivers on how to safely operate delivery vehicles and how to perform package deliveries. The Employer also first hires contract drivers as temporary employees so they can further learn the package delivery business and the routes they may one day service.

**d.     The Employer supplies contract drivers with the necessary instrumentalities, tools and the place of work.**

Contract drivers own or lease their delivery vehicles, which are costly, and are responsible for the vehicle’s maintenance, repair and fuel costs. However, in all other respects, the Employer provides contract drivers with all necessary instrumentalities, tools and support to effectively carry out the Employer’s package delivery services.

In this regard, the Employer offers the Business Support Package, which provides contract drivers with the required package scanner, all required work uniforms and badges, the installation and replacement of the Employer's logos and markings on delivery vehicles, weekly vehicle washings, and DOT physicals and vehicle inspections. While contract drivers are free to purchase these required goods and services elsewhere, there is no evidence that any Hartford-based contract driver has ever done so. The Employer also offers contract drivers the following benefits: (1) participation in its Time-Off Program, pursuant to which the Employer arranges for an approved driver to cover the contract driver's route while he or she is on vacation; (2) \$100 per accounting period to help defray repair costs to those contract drivers who maintain a sufficient vehicle maintenance account; (3) a list of vehicle dealers and finance companies, and access to its website featuring the names of other contract drivers selling their vehicles, through which the required delivery vehicles can be acquired; (4) general liability insurance at no cost; (5) access to an insurance firm, with which the Employer has a business relationship, that offers better and more affordable insurance rates; (6) daily route manifests and a "turn-by-turn" suggested delivery sequence; (7) assistance and, if necessary, intervention in repair disputes and purchase arrangements between a contract driver and a dealer; and (8) weekly "round table" discussions with management during which they receive suggestions on improving delivery performance. Finally, the Employer offers to initially pay for the contract driver's operating expenses for licenses, taxes and fees, as well as any direct expenses incurred by the Employer in connection with such payments. The Employer later deducts these costs from the contract driver's settlement check.

Although the record reflects that contract drivers have some input into the initial selection of their work location, i.e., their route, the Employer is free to thereafter unilaterally alter a contract driver's route and may "flex" more packages in or out of that route on a daily basis as it solely deems necessary.

**e. Compensation Package**

The contract driver's compensation package also supports employee status. In this regard, with the exception of TCZD payments, the Employer unilaterally establishes compensation rates for all contract drivers. In addition, contract drivers

have an extremely limited ability on a daily basis to influence their income through personal effort or entrepreneurial ingenuity because, as in *Roadway III*, the terminal manager determines the number of packages delivered each day due to route reconfiguration or daily “flexing”. The Employer also provides contract drivers with a guaranteed minimum compensation. In this regard, contract drivers derive significant income from the Employer’s “vehicle availability” payment, which contract drivers receive merely for showing up, and from the Employer’s payment of the TCZD, which insulates contract drivers against a route that is not yet fully developed. The Employer also shields drivers from loss due to substantially higher gasoline prices by providing them with a fuel/mileage settlement subsidy.

**f. The parties’ intentions regarding independent contractor status.**

Although the Agreement states that a contract driver provides services “strictly as an independent contractor and not as an employee”, only one Hartford-based contract driver has marked his vehicle to identify himself as an independent contractor. While contract drivers have the right to incorporate, only three current Hartford-based contract drivers, one of who is not in the petitioned-for unit, have done so.

The record also shows that contract drivers: (1) must purchase or lease their delivery vehicle; (2) are free to determine when to begin and end their workday provided they complete all delivery functions; (3) are free to determine the sequence of package delivery; (4) take breaks at their discretion; (5) do not receive traditional fringe benefits; (6) do not have taxes withheld from their settlement checks; and (7) are not subject to ordinary discipline and may challenge the termination of their Agreement through binding arbitration. [I note, however, that these same factors were present in \*Roadway III\* as well as the DDEs, where the Board previously determined that they are insufficient to satisfy the Employer’s burden.](#)

**g. Other factors**

The Employer asserts that the contract drivers’ option to operate multiple routes and to sell their routes establishes their independent contractor status. With regard to operating multiple routes, the evidence does not specifically reflect the



nature of any entrepreneurial risk that a contract driver undertakes in choosing to operate more than one route; nor does it reflect whether a multi-route contract driver necessarily realizes a greater net per-route profit than does a single-route contract driver. Furthermore, the evidence shows that none of the contract drivers in the petitioned-for unit have exercised their option to operate multiple routes.

As for the right to sell their routes, there is insufficient evidence to establish that this right provides the contract drivers with any significant entrepreneurial opportunity. In this regard, routes covered by the Hartford Terminal are readily available directly from the Employer at no cost, or in conjunction with a vehicle sale. Moreover, contract drivers may only sell their routes to buyers who are approved by the Employer and willing to enter into the standard operating Agreement. Notably, in the seven years the Hartford Terminal has been in operation, there have been only two route sales by contract drivers. In this regard, I find, as in *Roadway III*, that evidence of only a few route sales is insufficient to support the Employer's contention that the contract drivers are independent contractors.

The Employer primarily relies upon two Board Decisions, *Dial-a-Mattress*, 326 NLRB 884 (1998), and *Argix Direct, Inc.*, supra, in support of its contention that contract drivers are independent contractors. Both cases are clearly distinguishable from the instant case.

In *Dial-A-Mattress*, the Board found owner-operators who delivered the employer's product to be independent contractors. In making that finding, the Board noted that the owner-operators arranged their own training and were not required to provide delivery services each day, and that the employer played no part in the selection, acquisition, or inspection of the owner-operators' vehicles. The employer also had no requirement as to the type, model, color, size, or condition of the vehicles, and provided no fuel subsidy or maintenance subsidy. Each vehicle had to display the name of the owner-operators' companies, rather than the employer's name. Although not required to display the employer's advertising on their trucks, many owner-operators did so, in exchange for a fee. Owner-operators were not required to wear employer uniforms, and many had their own company uniforms. There was no guaranteed minimum compensation to minimize the owner-operators'

risks, and there was evidence that some owner-operators had negotiated changes in delivery rates with the employer. None of the above-described facts are present in the instant case.

In *Argix Direct*, the Board similarly found owner-operators who delivered the employer's product to be independent contractors. Unlike the instant case, however, the employer in *Argix Direct* did not require that the owner-operator's trucks be of any particular make, model, or color, and required only a small DOT-required sign with the employer's name. The employer also placed no restriction on the use of vehicles for other purposes, owner-operators were free to elect not to accept routes on specific days, and some curtailed their services for the employer one day a week in order to work elsewhere. The owner-operators were not assigned specific routes, and the employer did not guarantee that the owner-operators would receive work each day. The number of routes varied from day to day, so that owner-operators drove for the employer fewer than five days a week most of the year. Owner-operators received no guaranteed income. Moreover, it was common for contractors to operate multiple routes, as five of the contractors owned 20 of the 63 trucks.

Accordingly, based upon the foregoing and the record as a whole, I find that the Employer has failed to satisfy its burden of establishing that contract drivers are independent contractors within the meaning of Section 2(3) of the Act, and I shall include them in the petitioned-for unit.

**B. The supervisory status of Chiappa and the unit status of Dizinno**

It is well established that the burden of proving supervisory status is on the party asserting it. *Kentucky River Community Care v. NLRB*, 532 U.S. 706 (2001); *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, slip op. at 9 (Sept. 29, 2006). Based upon the foregoing and the record as a whole, I find that the Employer has failed to satisfy its burden of establishing that contract driver Paul Chiappa possesses and exercises supervisory authority within the meaning of Section 2(11) of the Act. In reaching this conclusion, I note the undisputed absence of any evidence that Chiappa has the authority, in the interest of the Employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or

responsibly to direct them, or to adjust their grievances, or to effectively recommend any of these actions using independent judgment.

The Employer supports its claim that Chiappa is a supervisor solely on the basis that Chiappa executed the Agreement covering the Manchester route that is currently operated by Dizinno, and that Chiappa receives the settlement check from the Employer covering Dizinno's route and then remits that check in full to Dizinno.

Contrary to the Employer's contention, the evidence clearly establishes that Chiappa executed the Agreement covering Dizinno's Manchester route only as a favor to the Employer and Dizinno, and not in order to partake in any proceeds generated by that route, or to assume any responsibility for the supervision of that route. More significantly, there is no evidence that Chiappa has ever possessed or exercised any supervisory authority vis-à-vis Dizinno in the operation of the Manchester route. Indeed, the evidence shows that the Employer treats Dizinno as a contract driver and not as Chiappa's employee. In this regard, from 2004 through the present, the Employer has directly supervised Dizinno in his performance of the Manchester route, has never discussed any issues related to Dizinno's route with Chiappa, and, until the second day of the instant hearing, maintained a separate contract driver's mailbox for Dizinno at the Hartford Terminal.

Accordingly, based upon the foregoing and the record as a whole, I find that the Employer has failed to satisfy its burden of establishing that Chiappa is a supervisor within the meaning of Section 2(11) of the Act.

I further find, contrary to the Employer's contention, that Dizinno shares a sufficient community of interest with the other petitioned-for contract drivers. In this regard, in assessing the appropriateness of any proposed unit, the Board considers a variety of community of interest factors, including the amount of wages and method of payment, employee benefits, hours of work, employee skills and functions, degree of functional integration, interchangeability and contact among employees, and whether the employees have common supervision, work sites, and other terms and conditions of employment. Kalamazoo Paper Box Corp., 136 NLRB 134 (1962).

Here, the record unequivocally establishes that Dizinno works out of the same Hartford terminal as do all other contract drivers, performing the same function for the

Employer. Dizinno reports to the same terminal management, begins his work day at that terminal at the same approximate start time as other contract drivers, and is subject to the same policies and practices as all other contract drivers, including customer service rides and driver release audits. Dizinno also undergoes the same training and periodic DOT testing as other contract drivers, and, similar to other contract drivers, receives the full settlement amount for the Manchester route that he solely operates. Based upon the foregoing and the record as a whole, I shall include Dizinno in the petitioned-for Unit.

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All contract drivers employed by the Employer at its Hartford Terminal; but excluding drivers and helpers hired by contract drivers, temporary drivers, supplemental drivers, multiple-route contract drivers, package handlers, office clerical employees, and guards, professional employees and supervisors as defined in the Act.

### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted among the employees in the unit found appropriate herein at the time and place set forth in the notices of election to be issued subsequently.

**Eligible to vote:** those employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were in the military services of the United States, ill, on vacation, or temporarily laid off; and employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements.

**Ineligible to vote:** employees who have quit or been discharged for cause since the designated payroll period; employees engaged in a strike who have been discharged for cause since the strike's commencement and who have not been rehired or reinstated before the election date: and employees engaged in an

economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

The eligible employees shall vote whether or not they desire to be represented for collective bargaining purposes by International Brotherhood of Teamsters, Local Union No. 671.

To ensure that all eligible employees have the opportunity to be informed of the issues in the exercise of their statutory rights to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision and Direction of Election, the Employer shall file with the undersigned, an eligibility list containing the *full* names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The undersigned shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional office, 280 Trumbull Street, 21st Floor, Hartford, Connecticut 06103, on or before April 18, 2007. No extension of time to file these lists shall be granted except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

#### **Right to Request Review**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision on Remand may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570, or electronically pursuant to the guidance that can be found at the Agency's Website at [www.nlrb.gov](http://www.nlrb.gov). Select the **E-Gov** tab and click on **E-Filing**, then select the type of document you wish to file electronically and you will navigate to detailed instructions on how to file the document. **This request must be received by the Board in Washington by April 25, 2007.**

Dated at Hartford, Connecticut this 11th day of April, 2007.

/s/ Peter B. Hoffman

Peter B. Hoffman, Regional Director  
National Labor Relations Board  
Region 34